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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

REPLY BRIEF FOR THE PETITIONER

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SUMMARY OF ARGUMENTS

I.

DOUBLE JEOPARDY

Ariz.Rev.Stat.Ann. § 13-1580 violates both the double jeopardy protection against prosecution following conviction and that against multiple punishment. The reference to "conviction" in § 13-1580 may either

be interpreted as establishing conviction as a requisite form of proof of the element of commission or as establishing the judicial act of conviction as an element of the crime. Since no Arizona court has defined what the elements of § 13-1580 are supposed to be, and one has clearly rejected the notion that conviction is a separate element, it is fair to argue as a subsidiary matter that conviction could not be an element where the petitioner was charged with § 13-1580 before he was convicted of burglary and was not charged with having been convicted of burglary.

The fact that the element of committing a felony could in other prosecutions involve the committing of felonies other than burglary does not distinguish it from committing a burglary in this case since the only provable element in this case was committing a burglary. If proof of commission while on release is an element of time of commission, it is an included element within the offense of burglary.

If, on the other hand, the State is arguing that § 13-1580 is composed of the independent judicial act of conviction and the status of release, these are not elements in the sense of elements of *actus reus, mens rea* or consequences of an *actus reus,* as the term elements has been used in applying the *Blockburger* test.

The fact that § 13-1580 purports to create a new crime and punishes anew for the old crime results in a contravention of the double jeopardy clause, while recidivist punishment enhancement statutes which differ in those respects do not violate double jeopardy.

The legislative history of § 13-1580 does not justify a conclusion that it was enacted as part of a policy of

release liberalization or in response to an increase in the rate of crimes committed while on release status.

The State has not contested petitioner's argument that if § 13-1580 is a separate offense for double jeopardy purposes, it is a bill of attainder. The State's argument that *Robinson v. California* does not reflect an Eighth Amendment prohibition of status crimes is without merit. In order to avoid petitioner's cruel and unusual punishment argument, the State argues that § 13-1580 punishes petitioner for his act of burglary and thus runs afoul of the double jeopardy argument.

II.

EQUAL PROTECTION

Since § 13-1580 significantly penalizes persons who exercise the fundamental right to release, punishing them more severely than others who commit like crimes, no evidence of actual deterrence of the exercise of the right need be shown.

Section 13-1580 reflects a legislative presumption that persons released on felony charges are guilty of the charges on which they are released, regardless of whether they are convicted thereof. In so doing, the statute contravenes the presumption of innocence. The *Thoresen* and *De Pugh* cases, cited by the State, should not be considered persuasive authority in this case. The presumption of innocence is protected by the Due Process Clause of the Fourteenth Amendment, is not identical to the requirement of proof beyond a reasonable doubt, and is a substantive as well as an

evidentiary right. It limits the power of legislatures and not just the judicial and executive branches of government. It's infringement can only be justified when demonstrably necessary to promote a compelling state interest. Petitioner does not agree with dicta of the Arizona Court of Appeals suggesting that if § 13-1580 were in the form of an enhanced punishment statute it might pass equal protection muster.

Section 13-1580 does not promote a liberal policy of release and such was not one of its purposes. It does not discourage flight by or ensure the presence of defendants, and it cannot be shown to be demonstrably necessary to discourage repetitious criminal activity.

ARGUMENTS

I.

DOUBLE JEOPARDY

The State begins its discussion of the double jeopardy question in this case by contending that:

> "Petitioner does not here and has never before complained that he has been put to trial twice for the same offense. He has complained only that he has been punished twice."

Brief for Respondent at 8 n. 1. That contention is sheer misstatement. Petitioner has never limited its argument that Section 13-1580 contravened the Fifth Amendment Double Jeopardy Clause to simply an argument that there was multiple punishment for the same offense. Clearly there is that. Just as clearly, there is in

this case an abridgment of the protection for former conviction which arose out of the common law plea of *autrefois convict*. *Ex parte Nielsen*, 131 U.S. 176 (1889) (cited in Brief for Petitioner at 8 & 11).

"From the context of this case, it is apparent that the defendant's conviction for burglary and for § 13-1580, were jeopardy *and* punishment for the same offense." Brief for Petitioner at 10 (emphasis added). In the proceedings on January 4, 1973 (App. 12-19) the trial court first accepted Mr. Cassius' plea of guilty to the burglary count; thereafter, the court tried the charge of "committing a felony while on recognizance on felony charge" (*Ariz.Rev.Stat.Ann.* § 13-1580) and found the defendant guilty. *See* Brief for Respondent at 7. There was no need for a lengthy trial or for a lengthy period of time between the acceptance of the plea to burglary and the trial of the § 13-1580 charge. The nature of § 13-1580 is such that, generally, all the evidence required to prove the charge are matters of judicial record and, therefore, proper subjects for judicial notice. As the State notes, trial of a § 13-1580 charge "will ordinarily be a short, perfunctory process." Brief for Respondent at 15. In this case there was only need for stipulation because the justice of the peace before whom petitioner initially appeared failed to insert a release order in the record when he ordered petitioner released.

Petitioner was first convicted of burglary (on a guilty plea) and then was convicted of "committing a felony while on recogizance on felony charge" (by trial, or as much of a trial as there can be, given the nature of the charge). In fact, since § 13-1580 requires evidence of a felony conviction to prove the § 13-1580 crime, a

§ 13-1580 conviction will always involve a prosecution on that charge subsequent to a conviction for the underlying felony. The duration of time between convictions is not relevant to whether a double jeopardy bar for multiple prosecutions may be interposed. In *Ex parte Nielsen*, the defendant was charged with unlawful cohabitation and adultery. He pleaded guilty at his arraignment to unlawful cohabitation. The same day, after having pleaded guilty to cohabitation and prior to sentencing, the defendant entered his plea of former conviction to the adultery charge. 131 U.S. 176, 177 (1889). If the two charges were for the same offense, then petitioner was placed in jeopardy for section 13-1580 after he had been found guilty (on his guilty plea) for the same offense.

This Court has noted that, like the protection against multiple punishments, the former conviction protection guards against "the punishment that would legally follow the second conviction." *Ex parte Lange*, 85 U.S. 163, 173 (1874). But it should also be noted that the former conviction bar denies the prosecutor control over the punishment imposed (i.e. denies him the opportunity to reprosecute until he obtains the sentence he desires) and denies him the opportunity to harass and inflict unnecessary suffering upon defendants through the ordeal of multiple prosecutions. Note, Twice in Jeopardy, 75 *Yale L.J.* 262, 278 (1965).

Ariz.Rev.Stat.Ann. § 13-1580 provides in part that "[a] person who is *convicted* of committing any felony offense . . . is guilty of the offense of *committing* a felony while released. . . ." (emphasis added). The reference to a felony conviction may indicate that proof of a conviction is necessary to establish the

element of commission of a felony, in which case commission of the felony is the element and proof of conviction is the requisite form of the evidence, not an element. Or, as the State argues, the statute may be interpreted to establish the judicial act of conviction, and not commission of a felony, as an element of the offense.

Petitioner has argued that commission of a felony and *not* the judicial act of conviction of a felony is an element of § 13-1580. Brief for Petitioner at 11. In support of this argument, we have noted that conviction could not possibly be an element of the offense since one cannot be charged with a crime before it is committed, and in this case Mr. Cassius was charged with violating § 13-1580 before he was convicted of burglary. The State now argues that this "issue" was never raised in the state courts of Arizona. Brief for Respondent at 13-14.

The *issue* under discussion is whether § 13-1580 contravenes the Double Jeopardy Clause of the Fifth Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment. The State does not contest the fact that that issue was properly raised by petitioner in and ruled upon by the state courts of Arizona. In this Court, "[t]he statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 41(d)(1) of the Rules of the United States Supreme Court. In determining any double jeopardy claim, a court must determine whether there has been jeopardy or punishment imposed more than once for the *same offense*. And when two criminal provisions are involved, a court must determine whether they define or are

being applied to the same offense. An obvious subsidiary line of inquiry when examining the identity of offenses, one incorporated into the "same elements" test, is whether the elements of the offenses are the same. Despite the manifest relevance of this line of inquiry, one will search the opinions of the Arizona Supreme Court and the Arizona Court of Appeals in this case in vain for any statement of what the elements of a § 13-1580 offense are. That determination was never expressly made. The nearest one comes to such a determination is the Arizona Court of Appeals' holding that conviction of a felony was *not* an element of § 13-1580 since conviction is merely a "*judicial act.*" (App. 35) 21 Ariz.App. 78, 82, 515 P.2d 903, 907 (1973).

Petitioner has argued that conviction of a felony is not a separate, distinquishing element of § 13-1580 because petitioner is arguing that § 13-1580 punishes and prosecutes for the same offense as the felony to which it refers. It is a fair subsidiary position to note that the Arizona Supreme Court, which claimed to "have examined the record for fundamental error and [found] none," (App. 50) 110 Ariz. 485, 488, 520 P.2d 1109, 1112 (1974), must also have found that *conviction* of a felony was not an element of § 13-1580; if it were an element, since Mr. Cassius was charged before he was convicted of the felony and since both the complaint and indictment charging him with violating § 13-1580 (App. 4 & 11) accused him of having "committed the crime of burglary," not of having been convicted thereof, the court would have had to reverse Mr. Cassius' conviction as unsupported by the evidence and insufficiently charged.

The State argues that § 13-1580 is an offense composed of two elements which are completely different from the elements of the underlying felony. Brief for Respondent at 12-26. The State claims that the first of these elements is "conviction of a felony (not necessarily a burglary)." Brief for Respondent at 12. As petitioner had noted before, the element of commission of a felony is really a series of disjunctive elements– "committing robbery; or burglary, or grand theft, or arson, or any other felony offense." Brief for Petitioner at 11. In any given prosecution, the only one of these disjunctive elements which can be or need be proven is the element of commission of the one particular offense of which the defendant was convicted. Since Mr. Cassius was only convicted of burglary, the only commission element of which the State could offer proof in its § 13-1580 prosecution was the element of commission of burglary. Thus, the elements of committing burglary and the elements of committing the only provable felony in this case are the same.

The State claims that the second element is "proof that that felony was committed while the defendant was released on bail or on his recognizance." Brief for Respondent at 12. If this is an element of time of commission, it is merely a particularization and thus an included element. The crime of burglary includes both burglaries committed while the defendant is released and burglaries committed while the defendant is not released. A defendant cannot be placed in jeopardy or punished for a particularized, included offense after he has been acquited, convicted or punished for the more general offense. E.g. *Ex parte Nielsen*, 131 U.S. 176

(1889); *Gray v. United States*, 14 F.2d 366 (8th Cir. 1926); *Colson v. Johnston*, 35 F.Supp. 317 (N.D. Cal. 1940); *People v. Greer*, 30 Cal.2d 589, 184 P.2d 512 (1947); *People v. Armstrong*, 100 Cal.App.2d 852, 224 P.2d 490 (1950); *People v. Bugarin*, 507 P.2d 875 (Colo. 1973); *State v. Midgeley*, 15 N.J. 574, 105 A.2d 844 (1954).

On the other hand, if the State's reference to a conviction element is to the judicial act of conviction, independent of the commission of a felony, and its reference to a release element is to the status of being released, then neither of these "elements" involves what Anglo-American jurisprudence has considered elements of criminal responsibility, an *actus reus*, *mens rea*, or consequence of an *actus reus*. Although the State casually refers to the test of *Blockburger v. United States*, 284 U.S. 299 (1932) in a literal sense as requiring proof of an "additional fact." The additional fact to which *Blockburger* refers has always been interpreted as an element of *actus reus*, *mens rea* or a consequence of an *actus reus*. Each of the cases cited by the State as illustrating the *Blockburger* test involves such an element. But neither a judicial act nor a status such as the State appears to propose would be such an element.

Although the State admits that "it is evident the Legislature intended burglary and 1580 to be separate offenses and each to be severally punished" (Brief for Respondent at 27), it attempts to analogize § 13-1580 to recidivist enhanced punishment statutes. Brief for Respondent at 14-16. As the State admits § 13-1580 differs from enhanced punishment statutes in that it "does create a new offense and it does punish anew

[for the old crime]." Brief for Respondent at 15. It is precisely in these distinctions that § 13-1580 runs afoul of the double jeopardy clause whereas enhanced punishment statutes do not. This Court has found recidivist enhanced punishment statutes not to violate the prohibition against double jeopardy because they do not charge "an offense with respect of the former offense" *Moore v. Missouri*, 159 U.S. 673, 677 (1895), are "not a distinct charge of crimes" *McDonald v. Massachusetts*, 180 U.S. 311, 313 (1901), and because they do not impose " 'a punishment for the same offense for a second time' " *Moore v. Missouri*, 159 U.S. 673, 676 (1895), but rather, impose punishment "for the new crime only," *McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901). Compare the decisions concerning such statutes with *Reynolds v. Cochran*, 365 U.S. 525, 529-30 (1961), *on remand*, 138 So.2d 500 (Fla. 1962).

Because § 13-1580 purports to create a separate crime and punishes anew for the old crime, conviction of it carries a variety of consequences that do not flow from an allegation under an enhanced punishment statute. As pointed out in Brief for Petitioner at 8-9, conviction of § 13-1580 acts as a conviction for a separate, subsequent offense to activate recidivist penalty provisions, effect less advantageous accruals of "good behavior time" credits and prolong eligibility dates for parole. Because it can be charged at any time after conviction, including after the expiration of sentence on the underlying felony, it gives the prosecutor far more control over sentencing than he possesses under an enhanced punishment statute. Because it requires trial anew, § 13-1580 gives the

prosecutor greater opportunity to harass through successive prosecutions than does an enhanced punishment statute.

The State elaborately claims a legislative purpose and history for § 13-1580 allied to liberalization of release procedures and a "proliferating problem of those on bail continuing their criminal careers." Brief for Respondent at 27-30 & 44-45. But such a claim is sheer speculation since there simply is no published legislative history or statement of legislative purpose for § 13-1580 which illuminates the intent of the legislature in enacting § 13-1580 and there is no evidence that its enactment was preceded by a dramatic increase in the rate of crime committed while on release status. As the State notes, § 13-1580 was enacted some two years after provision was made for revocation and denial of release following an allegation that crime was committed while on release status. Brief for Respondent at 29. Ch.126, § 1, [1972] *Ariz.Laws*2d Sess. 663. And § 13-1580 was enacted more than a year before Arizona's first provision for a legal presumption in favor of release before trial became effective, that provision being Rule 7.2(a) of the Arizona Rules of Criminal Procedure, promulgated by the Arizona Supreme Court, not the Legislature.

Petitioner has argued that if § 13-1580 is a separate offense within the meaning of the double jeopardy clause then surely, since § 13-1580 imposes a legislative punishment applied to an easily ascertainable group without the necessity of an additional trial, it is a bill of attainder. And, further, since § 13-1580, is under the State's construction, a status crime, it imposes a cruel and unusual punishment. Brief for Petitioner at 12-13.

The State candidly admits that prosecution under § 13-1580 "will ordinarily be a short, perfunctory process." Brief for Respondent at 15. And the State argues, "At the 1580 trial the proof is *not of the acts*, but the conviction that resulted from those acts plus petitioner's bail status." Brief for Respondent at 17 (emphasis added).

The State does not contest the argument that § 13-1580 contravenes the constitutional prohibition against bills of attainder. *Compare, United States v. Brown*, 381 U.S. 437 (1965); *Cummings v. Missouri*, 71 U.S. 277, 316-25 (1867).

The State does, however, argue that there is no abridgment of the Eighth Amendment's Cruel and Unusual Punishment Clause. Brief for Respondent at 30-32. The State's principal argument is that *Robinson v. California*, 370 U.S. 660 (1962) should be limited to its facts, and does not reflect a prohibition against status crimes.

This Court, of course, is the best and final judge of its own holdings and intendments. And so there is a certain futility in engaging in any prolonged argument of this kind. It should, however, be noted that this Court's opinion in *Robinson* declared as follows:

> "[T]he jury were instructed that. . . .[t]he appellant could be convicted. . .if they found simply that the appellant's '*status*' or 'chronic condition' was that of being 'addicted to the use of narcotics.'" 370 U.S. at 665 (emphasis added).
>
> "The statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their adminis-

> tration. . . .Rather, we deal with a statute which makes the '*status*' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' "
> 370 U.S. at 666 (emphasis added).

Indeed, the very dissent of Mr. Justice Clark, from which the State quotes, notes:

> "The majority strikes down the conviction primarily on grounds that petitioner was denied due process by the imposition of criminal penalties for nothing more than being in a status."
> 370 U.S. at 682.

It may well be, as is alluded to by some of the opinions cited by the State, that the cruel and unusual punishment protection interpreted by *Robinson* is broader than just a prohibition against status crimes, but it is at least that much, and none of the authorities cited by the State (Brief for Respondent at 31) dispute this. In sum, *Robinson*, reflects a requirement that crimes must contain an *actus reus*.

Finally and ironically, although the State and the Arizona Supreme Court in opposing petitioner's double jeopardy argument, have contended that § 13-1580 has no element in common with the underlying felony and is not a second punishment for his burglary conviction, the State finds it necessary to reverse that contention when faced with petitioner's cruel and unusual punishment argument. The State declares that when Mr. Cassius committed the burglary of which he was convicted:

> "his status was that of a charged felon on his own recognizance but neither *Robinson* nor any other authority cited by him would prevent a state from punishing him for that second burglary." Brief for Respondent at 32.

II.

EQUAL PROTECTION

The State concedes that the right to bail or other forms of release is fundamental and notes that there is federal as well as state constitutional protection for it. Brief for Respondent at 35-36 & 36 n.1. *See e.g., Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). The State argues, however, that petitioner has not 'demonstrated a penalizing or impairment or chilling of that right'. Brief for Respondent at 35-38. It is unclear what kind of a showing the State believes petitioner must make. As the State admits, "[t]he obligation not to violate the law" applies "to those persons not released before trial" as well as those released. Brief for Respondent at 43. But the person who is in custody or the person who is free and not on a release status (and this may include persons accused of crimes who have not been arrested therefor; *see Ariz.R.Crim.* P.4.1& 7.4(a), and App. 13-14) is punished only once, while the person who exercises his right to release is, for that reason, punished twice and punished more severely for committing the same felonious act. The imposition of additional punishment because a fundamental right has been exercised is certainly a penalizing of that right. *See, United States v. Jackson*, 390 U.S. 570 (1968). Evidence of actual deterrence of the exercise of a right is not necessary if the challenged discrimination significantly penalizes such exercise. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257-58 (1974). Here exercise of the right to release is penalized by the collateral consequences of an additional felony conviction and by up to five years additional imprisonment.

If the duty to obey the law is not peculiar to released persons, why is it that § 13-1580 punishes such persons more severely, and thereby imports that they are more culpable, than others who violate the law? The answer is that § 13-1580 presumes that a person released upon a felony charge is guilty of that charge and when he commits a felony while released, the latter is in fact the second felony he has committed. This presumption pervades the State's brief. *See, e.g.*, Brief for Respondent at 31-32, 64 & 66.

To prove a violation of § 13-1580, three events must occur. (1) The defendant must be charged with felony A and released (on bail or recognizance) thereon. (2) The defendant must subsequently be charged with felony B, which is alleged to have occurred while the defendant was released under charge A. (3) The defendant must be convicted of felony B. The defendant does not have to be convicted of felony A. Indeed, the defendant may be shown to be utterly blameless, completely innocent of charge A, yet it does not matter; § 13-1580 still treats the defendant as a recidivist. It is the presumption of innocence with regard to charge A which is thus contravened, and the fact that the defendant must be convicted of charge B (Brief for Respondent at 53) is utterly irrelevant thereto.

The State relies upon *United States v. Thoresen*, 428 F.2d 654, 661 (9th Cir. 1970) and *United States v. De Pugh*, 266 F.Supp. 453, 454-55 (W.D. Mo. 1967) (ruling on a pretrial motion). Each of these cases interpreted former section 15 U.S.C. § 902 (e), which had been repealed by the time Thoresen's case was heard by the Court of Appeals. Omnibus Crime Control

and Safe Streets Act of 1968, Pub. L.No. 90-351, Title IV, § 906, 82 Stat.197, 234. The statute in question made it unlawful for a person under indictment for a felony to transport firearms or ammunition in interstate commerce. These cases involve the transportation of dangerous instrumentalities, a factor, not present in petitioner's case. But, in any event, the best that can be said for these decisions is that they are bad law. Outside of restating the defendant's argument, *DePugh* doesn't even mention the presumption of innocence. In fact, the decision appears to presume to the contrary:

> "A person who is under indictment for alleged commission of a crime punishable by imprisonment for a term exceeding one year. . .presents more than ordinary risk (even though he might later not be convicted of the offense charged) in transporting or possessing firearms." 266 F.Supp. at 454.

Both *DePugh* and *Thoresen* apply a "reasonable relationship" test of equal protection instead of the demonstrably necessary-compelling state interest test which inheres when a basis of classification affects a constitutionally protected fundamental right. Both also seem to imply that the presumption of innocence is a right which only applies to matters of proof at trial (i.e., that is solely an evidentiary right and not a substantive right).

It cannot now be questioned that the presumption of innocence is protected by the Due Process Clause of the Fourteenth Amendment. In addition to *In re Winship*, 397 U.S. 358 (1970), cited in Brief for Petitioner at 16, *see Cupp v. Naughten*, 414 U.S. 141 (1973); *Deutch v. United States*, 367 U.S. 456, 471 (1961); *Stack v.*

Boyle, 342 U.S. 1, 4 (1951); *Gaito v. Brierly*, 485 F.2d 86, 88-89 (3rd Cir. 1973); *Bentley v. Crist*, 469 F.2d 854 (9th Cir. 1972); *Hernandez v. Beto*, 443 F.2d 634 (5th Cir.), *cert denied*, 404 U.S. 897 (1971). This Court has held that the presumption of innocence is broader than and not identical to the requirement of proof beyond a reasonable doubt. *Coffin v. United States*, 156 U.S. 432, 457-61 (1895). Even as an evidentiary matter, the presumption cautions against " 'all the suspicion that arises from the arrest, the indictment, and the arraignment' " of defendants. *United States v. Thaxton*, 483 F.2d 1071, 1073 (5th Cir. 1973). But the presumption of innocence is also a substantive right. And just as the executive department of government may not impose punishment in contravention of the presumption of innocence, *Conklin v. Hancock*, 334 F.Supp. 1119, 1121 (D.N.H. 1971); *Hamilton v. Love*, 328 F.Supp. 1182 (E.D.Ark.1971); *cf. Screws v. United States*, 325 U.S. 91 (1945), so the legislative department should not. *cf. Cummings v. Missouri*, 71 U.S. 277, 325, 328, 330-31 (1867).

The error of *DePugh* and *Thoresen* is further illustrated by their effect. If a defendant transported firearms while under indictment, something other presumptively innocent people could do, his conviction therefor would stand even though the indictment was subsequently quashed. *DePugh v. United States*, 393 F.2d 367 (8th Cir.), *cert. denied*, 393 U.S. 832 (1968). But if the defendant transported firearms following a felony conviction, also a violation of former 15 U.S.C. § 902 (e), and his felony conviction was made voidable by violations of his procedural constitutional rights, then his § 902 conviction would have to

be overturned. *Dameron v. United States*, 488 F.2d 724 (5th Cir. 1974); *Pasterchik v. United States*, 466 F.2d 1367 (9th Cir. 1972); *United States v. Thoresen*, 428 F.2d 654, 662-64 (9th Cir. 1970).

The State argues that petitioner's equal protection argument is without merit because the Arizona Court of Appeals suggested that a punishment enhancement statute might be acceptable to it. Brief for Respondent at 66-67. (App. 41) 21 Ariz.App.78, 85-86, 515 P.2d 903, 910-11 (1973). Petitioner agrees with the State that, *with regard to infringements of the equal protection clause* distinctions between § 13-1580 and punishment enhancement statutes based upon the same criteria as § 13-1580 are immaterial. Petitioner has not accepted such a distinction before this Court. And petitioner expressly rejected that distinction below.

> "Defendant submits in addition that appellee's reliance on D.C. Code Ann. § 23-1328 (1971) is also misplaced. Though the [Arizona] Court [of Appeals] suggests the D.C. provision as a possible alternative, it stops short of attesting to its constitutionality. Indeed, under the Court's decision it is difficult to see how any statute which punishes a person solely for having committed a felony while on bond can avoid the defects of A.R.S. § 13-1580 (Cum.Supp. 1972)." Defendant's Opposition to Motion for Rehearing at 6, *State v. Cassius*, 21 Ariz.App. 78, 515 P.2d 903 (1973) (footnote omitted).

The State argues that § 13-1580 somehow promotes a liberal policy of release and that such was one of its purposes. Brief for Respondent at 44-45 at 64. As previously noted, *supra* at p.*10-11*, § 13-1580 was not enacted concurrent with any legislative scheme of

release liberalization and the only liberalization of release procedures in Arizona occurred more than a year after § 13-1580's enactment as a result of a promulgation by the Arizona Supreme Court. Section 13-1580 singles out for more severe punishment those who commit felonies while on bail or recognizance; it has no effect upon whether and under what conditions release will initially be granted. The State apparently believes that those whose rights are infringed by § 13-1580 should welcome it because, for reasons unknown, the Legislature did not also enact a preventive detention measure (Brief for Respondent at 44-45); petitioner cannot agree.

The State argues that another purpose of § 13-1580 is to ensure the presence of defendants at trial and discourage flight. Brief for Respondent at 46-50 &64. But § 13-1580 does not make flight a crime; indeed, one must have remained in Arizona to violate § 13-1580. The State claims that "the risk of flight increases 'proportionately' with the commission of subsequent offenses while released on bail, because of the possibility of cumulative penalties." Brief for Respondent at 49. The little empirical evidence which is available refutes that assertion. *See, e.g., Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 604 (1969) (Excerpts from the Report of the President's Comm'n on Crime in the District of Columbia). But, in any event, if one accepts that claim, then § 13-1580 should encourage flight since it raises the possibility of an additional cumulative penalty.

Finally, the State argues that § 13-1580 bars release following repetitious criminal activity, prevents such repetitious criminal activity among released persons and thereby prevents undermining of the administration of justice. Brief for Respondent at 52 & 64-65. There is not one word in § 13-1580 regarding conditions of release following imposition of the charge therein. Provisions for release revocation were enacted and the principal Arizona decision thereon occurred prior to § 13-1580's enactment, as is noted in Brief for Respondent at 28-29. And the State gives no clue why § 13-1580 should be any more efficacious in reducing repetitious crimes than those measures otherwise currently available. *See* Brief for Petitioner at 17.

CONCLUSION

Petitioner continues to rely on all matters raised in his opening Brief for the Petitioner. For the reasons expressed therein and for the foregoing reasons, the judgment of the Arizona Supreme Court should be reversed and the case remanded with instructions that the judgment of conviction for *Ariz.Rev.Stat.Ann* § 13-1580 and sentence imposed thereon be ordered vacated and the charge of violation of

Ariz.Rev.Stat.Ann § 13-1580 contained in Count II of the indictment against petitioner be dismissed.

Respectfully submitted,

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